

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

61109

FILE: B-184194

DATE: July 19, 1976

MATTER OF: Environmental Protection Agency
Request for Modification of GAO Recommendation

97905

DIGEST:

1. GAO Bid Protest Procedures provide that requests for reconsideration must be filed within 10 working days by appropriate interested party or agency. However, considering agency's request that modification of recommendation in GAO decision be allowed--due to changing circumstances in procurement--has also been recognized as appropriate and is not inconsistent with Bid Protest Procedures. To decline to consider such information could jeopardize best interests of Government.
2. Though it is contended that contracting agency's procrastination in responding to protest has prevented protester from obtaining equitable and just result, record does not support allegation that all delays were caused by agency, but rather shows that substantial delays in protest proceedings are directly attributable to protester's actions.
3. Some changes in request for proposals (RFP) can be made appropriately by amendment, but substantial changes may justify canceling RFP and issuing new, revised RFP. While several reasons offered by agency for canceling RFP are subject to question, others indicate that certain amendments to RFP are appropriate and necessary. Amendments may revise RFP's terms to extent that, as agency claims, it would become preferable to cancel and resolicit.
4. Contention that agency issued three RFP's to circumvent effect of protest pending under separate RFP involves subjective motives of agency officials which cannot be conclusively established on written record. No provision of procurement law specifically prohibits concurrent procurement of work similar to work being sought under protested solicitation. Moreover, three additional RFP's

have not eliminated need for work involved in protested procurement, and protester has not been deprived of its opportunity to compete for award.

5. Where GAO decision after lengthy protest proceeding recommended continuing competition under RFP, Environmental Protection Agency's (EPA) position that RFP is defective and should be canceled--formally documented for first time 3 months after decision and 10 months after protest was filed--raises serious questions concerning Agency's understanding of and adherence to fundamental procurement policies and procedures, since inaction by Agency in failing to ascertain and promptly disclose RFP deficiencies has created delay and confusion in procurement process.
6. After considering all circumstances of procurement, GAO cannot conclude that EPA's justifications for canceling RFP are clearly without reasonable basis. However, since several of alleged justifications are subject to question, GAO recommends that EPA Administrator review and reconsider proposed cancellation in light of points addressed in decision.

The United States Environmental Protection Agency (EPA) requests that we allow a modification in the corrective action recommended in our decision which sustained a protest by the University of New Orleans (UNO).

The decision (University of New Orleans, B-184194, January 14, 1976, 76-1 CPD 22) recommended that EPA (1) amend request for proposals (RFP) No. WA 75-R148 to rescind an earlier amendment which had created problems in the procurement, and (2) reopen and continue the competition among the six offerors which had submitted proposals under the RFP. Details of the procurement, which involves scientific study of halogenated organic substances in the environment, are set forth in our earlier decision.

EPA wishes to cancel RFP WA 75-R148 and issue a new RFP in its place. EPA requests that we concur in this action and thereby modify our recommendation to this extent.

Procedural Issues Involved
in EPA Request and UNO Protest

Certain procedural matters must be addressed at the outset. UNO contends that EPA's request for modification of the recommendation in our prior decision cannot properly be considered under our Office's Bid Protest Procedures (40 Fed. Reg. 17979 (1975), codified at 4 C.F.R. part 20 (1976)). UNO cites section 20.9 of our procedures, which provides in pertinent part:

"(a) Reconsideration of a decision of the Comptroller General may be requested by the protester, any interested party who submitted comments during consideration of the protest, and any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

"(b) Request for reconsideration of a decision of the Comptroller General shall be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. The term 'filed' as used in this section means receipt in the General Accounting Office."

UNO believes that EPA's request is not a "request for reconsideration," because it does not allege "errors of law" in our decision, nor does it set forth "information not previously considered." Moreover, UNO suggests that EPA's request is untimely, because our decision was rendered on January 14, 1976, and EPA's initial request is dated February 2, 1976.

Where it is alleged that a protest decision of our Office contains errors of fact or law, we believe that a request for reconsideration must be filed within 10 working days by an appropriate party in interest. On the other hand, we note that there are situations where a contracting agency does not disagree with the basic holding in GAO's decision, but nevertheless develops and presents information showing that carrying out our decision's recommendation would be inappropriate, or that a different course of action would better serve the Government's interests.

See, for example, Michael O'Connor, Inc., B-185502, May 14, 1976, 76-1 CPD 326. Our Office had recommended in an earlier decision that a solicitation be canceled. The contracting agency, by letter dated 12 working days after our decision, presented information indicating that because of a change in one of its existing contracts involving similar work, it had become appropriate to make an award under the solicitation rather than canceling it. After considering this information, our Office stated that we had no objection to the proposed award.

Another similar case is Linolex Systems, Inc., 54 Comp. Gen. 483 (1974), 74-2 CPD 344. Our earlier decision on the protest had recommended a resolicitation. The contracting agency subsequently pointed out, however, that under the developing circumstances it would be preferable simply to wait for the normal procurement cycle to begin before resoliciting. We concurred in the agency's request to do so.

We believe it would not be proper for our Office to decline to consider the agency's views in situations of this kind. The best interests of the Government could be jeopardized by a refusal to at least consider and hear the agency's position. Accordingly, we believe that considering EPA's request in the present case is appropriate and not inconsistent with our Bid Protest Procedures.

UNO has also complained that delay and procrastination on EPA's part throughout these proceedings have prevented UNO from obtaining an equitable and just result in this matter. UNO feels that all delays connected with the protest and subsequent proceedings have been caused by EPA.

We believe that a speedier resolution of this matter would have been facilitated if some of EPA's submissions to our Office had been made in a more prompt manner. However, we must disagree with UNO's assertion that all delays have been caused by EPA. Initially, we note that shortly after it filed its protest in June 1975, UNO contacted our Office and expressed a desire to submit further details in support of its position. We advised UNO that any further details should be submitted as soon as possible, because delay in doing so could result in delay in EPA's report responding to the protest.

However, UNO's additional details were not received until July 22, 1975. By that time, EPA's report (dated July 30, 1975)

was in its final stages of preparation. EPA's report did not respond to all of the points made in UNO's submission received on July 22, 1975. As a result, a supplementary report was requested from EPA. EPA responded by letter dated September 24, 1975. We believe that delay on UNO's part in promptly documenting all of the grounds of its protest substantially contributed to the need to obtain a supplementary report from EPA.

Notwithstanding this delay, our Office was in a position to begin preparing a decision on October 14, 1975. However, UNO raised a number of procedural questions and objections. UNO maintained that another supplementary report from EPA was needed. UNO requested that our Office obtain assistance from independent scientific experts to review the issues in the protest. UNO declined to schedule the protest conference it had requested until these procedural points were considered and resolved.

Our Office believed that the procedural measures requested by UNO were neither necessary nor desirable under the circumstances of the case. However, UNO had submitted arguments in support of its position, and we carefully considered these before rejecting them. The result was a considerable delay in the proceedings. Our Office was not able to begin preparing a decision on UNO's protest until December 19, 1975.

It is noteworthy that our Office's decision sustained UNO's protest. We believe that but for the delays attributable to UNO, it is conceivable that a decision upholding the protest might have been rendered in September or October 1975 instead of January 1976.

Analysis of EPA Justification for Canceling RFP

EPA's position, as stated in letters to our Office dated February 2 and April 22, 1976, is that numerous deficiencies in RFP WA 75-R148 so seriously impair the offerors' ability to submit meaningful proposals that only a major revision of the RFP could correct the situation. Accordingly, EPA believes that RFP WA 75-R148 should be canceled.

The following is a list of justifications offered by EPA in support of its request. For several of these, our comments are provided. In considering EPA's position and making our comments, we have reviewed the revised statement of work which EPA intends to include in the new RFP.

1. Issuing a new RFP would maximize competition (i.e., it would allow concerns other than the six original offerors an opportunity to submit proposals).

GAO comment: Federal Procurement Regulations § 1-3.101(d) (1964 ed. amend. 153) provides that negotiated procurement shall be on a competitive basis to the maximum practical extent. However, we do not believe that this principle, considered in and of itself, necessarily justifies canceling an existing RFP and issuing a new RFP. Unless there is a reasonable basis to believe that continuing the competition under an existing RFP will not lead to the receipt of technically acceptable proposals whose realistic probable costs are considered reasonable, we see no grounds why the RFP should be canceled in the hope of experiencing better results under a new RFP.

2. A substantial amount of time has passed since RFP WA 75-R148 was originally issued in December 1974.

GAO: This, in itself, is not a sufficient justification for canceling the RFP. It would become a significant factor only if EPA's needs have substantially changed over the course of time, or if, as indicated supra, so few offerors under the RFP are willing to continue to participate that a competition leading to satisfactory results cannot reasonably be expected to take place.

3. To amend the RFP, as GAO recommended in its decision on the protest, might be confusing to the offerors.

GAO: Copies of our protest decision were furnished to the six offerors involved in the procurement. None has indicated to us that it has experienced difficulty or confusion on this point. Given the amount of time this procurement has been ongoing and its history, it is possible that any action taken--including issuing a new RFP--could create some confusion.

4. The work requirements in RFP WA 75-R148 are so vast and comprehensive that they could not reasonably be accomplished within the time and cost limitations considered appropriate by EPA.

GAO: In comparing the offerors' proposed costs under RFP WA 75-R148 and the projected duration of the study (27 months) with the proposed

budget and projected study duration of the new RFP, we have difficulty seeing a significant degree of difference.

5. The RFP's list of chemicals to be studied was mixed and unspecific as to classes of compounds to be examined.

GAO: It is likely that this problem could be satisfactorily corrected by an amendment to the RFP.

6. The RFP's criteria for selecting chemicals and geographical sites were lacking or conceptually inappropriate to the study design.

GAO: No comment.

7. The RFP was not clear as to how the initial environmental monitoring studies could be accomplished without undertaking a prohibitively expensive nationwide study.

GAO: It is not apparent to us why amending RFP WA 75-R148 and further negotiations could not definitize both the amount of monitoring required and its probable realistic cost. At that point in time, the contracting officer would be in a position to determine whether the probable costs are unreasonably high.

8. The RFP was unclear as to which links in the chain of events from industrial sources to human health effects are of highest priority.

GAO: No comment.

9. The RFP did not clearly indicate how the chemicals were to be selected for study, and by whom.

GAO: See comment to item No. 5, supra.

10. The RFP did not clearly indicate how geographic areas and study sites were to be selected.

GAO: No comment.

11. The RFP did not clearly indicate how much monitoring was required to select study sites.

GAO: See comment to item No. 7, supra.

12. The reason for collecting body burden data, and their relationships to health effects and/or environmental levels, were not clear in the RFP.

GAO: No comment.

13. The RFP did not clearly indicate whether the contractor should determine industrial sources of halogenated organics.

GAO: This could possibly be corrected by an amendment to the RFP.

14. The relative weights to be given different environmental media were not clearly indicated in the RFP.

GAO: This deficiency in the RFP was extensively discussed in our earlier decision, wherein we recommended correcting it by an amendment to the RFP.

It may be appropriate to make some changes in an RFP's terms or specifications by amendment rather than cancellation and resolicitation. See, for example, Rantec Division, Emerson Electric Co., B-185764, June 4, 1976. On the other hand, substantial changes in the specifications may justify cancellation of the RFP. 53 Comp. Gen. 139 (1973). Regardless of the particular factual situation, deciding whether to cancel an RFP is in the first instance a matter for the sound judgment and discretion of responsible agency officials. A decision to cancel is subject to objection upon review by our Office only if it is clearly shown to be without a reasonable basis. See Federal Leasing, Inc., et al., 54 Comp. Gen. 872 (1975), 75-1 CPD 236. The same standard of review applies to an agency's determination of its minimum needs and to the agency's drafting of specifications which properly reflect those needs. Julie Research Laboratories, Inc., 55 Comp. Gen. 374 (1975), 75-2 CPD 232.

As our comments above indicate, we believe that several of the justifications for canceling the RFP advanced by EPA are subject to question. At the same time, we recognize that some of the reasons cited by EPA may indicate that changes in the current RFP's statement of work requirements have become appropriate and necessary. While a certain number of changes could possibly be made by amending the current RFP, it is apparent that as the number of changes increases, the RFP may be revised to such an extent that it would become preferable to cancel it altogether and issue a new RFP in its place.

In addition, there are other points bearing upon the proposed cancellation which must be considered. In its protest, UNO alleged that three RFP's were issued by EPA in September and October 1975 which duplicate or diminish the scope of work under RFP WA 75-R148. These were:

<u>RFP</u>	<u>Issue Date</u>	<u>Scope of Work</u>
WA 76-R022	September 4, 1975	On-call collection and analysis of samples to determine levels of selected heavy metals, chlorinated hydrocarbons, and other toxic organic chemicals in air, water, soil and sediments.
WA 76-R020	September 9, 1975	On-call collection and analysis of human tissue, blood and urine samples to determine levels of selected heavy metals, chlorinated hydrocarbons, and other organic and inorganic toxic chemicals.
WA 76-X031	October 20, 1975	Sampling and analysis of selected toxic substances in various environmental media.

UNO suggested in its protest that the purpose of these procurements may have been to eliminate the need for the work to be obtained under RFP WA 75-R148 and thereby justify its cancellation. Since EPA is now proposing to cancel RFP WA 75-R148, UNO has reasserted this objection.

We believe that UNO's contention, in effect, is that EPA issued the three additional RFP's with the intention of circumventing the possible effect of the protest under RFP WA 75-R148. This necessarily calls into question the subjective motivations of EPA procurement personnel. We are unaware of how the alleged improper intentions which UNO attributes to EPA could be conclusively established in light of the written record which forms the basis for our protest decisions. Moreover, there are several points which militate against any such conclusion. First, as we observed in our earlier decision, we are not aware of any provision of procurement law which specifically prohibits a contracting agency from separately procuring work similar to the work being sought under a protested solicitation. See, in this regard, Poloron Products, Inc., B-184420, B-185206, April 7, 1976, 76-1 CPD 230. Second, we note that the three RFP's mentioned above have not eliminated the need for a scientific study of halogenated organic substances in the environment, and that EPA's issuance of a new RFP for this study does not deprive UNO of an opportunity to compete for an award.

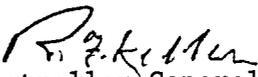
Nonetheless, any action which might create even the appearance of adversely affecting the integrity of the Federal procurement system must be carefully weighed by the contracting agency. In addition, we believe that certain circumstances in this case raise serious questions concerning EPA's understanding of and adherence to basic procurement policies and procedures which are essential if the Government is to effectively obtain services to meet its needs. The most serious question, in our opinion, is the point in time at which EPA became aware or should have become aware of the numerous deficiencies in the RFP which the agency now believes justify cancellation and resolicitation. To again review the chronology of this matter, the RFP was issued in December 1974; initial proposals were received in January 1975; UNO protested in June 1975; and our decision was rendered in January 1976. EPA first requested in February 1976 that we concur in the issuance of a new RFP. However, EPA did not furnish its detailed explanation of why RFP WA 75-R148 was defective until April 1976.

We find it difficult to understand why, during this extended period of time, EPA did nothing to call to the attention of our Office and the offerors the RFP deficiencies which it now believes would preclude making an award to any offeror under the solicitation. It appears that the problems with the RFP should have been apparent to EPA long before they were formally reported to our Office in April 1976. EPA's inaction had several unfortunate effects. For one thing, it meant that our Office's January 14, 1976, decision

in this matter was not directed at the most pertinent issues in the procurement--since the numerous deficiencies in the RFP which EPA now asserts were not brought before our Office while UNO's protest was under consideration. Also, it left several of the offerors in a confused and uncertain position, because they did not know whether or when any award would be made. Further, it delayed the procurement of services necessary to meet EPA's needs.

Conclusion and Recommendation

Considering all of the circumstances of this case, we cannot conclude that the justifications for EPA's proposed cancellation of RFP WA 75-R148 are clearly without a reasonable basis. Accordingly, it is inappropriate for our Office to interpose any legal objection to this action. However, since we believe that several of the justifications are subject to question, we are recommending by letter of today that the EPA Administrator review and reconsider the proposed cancellation in light of the points discussed in this decision.


Deputy Comptroller General
of the United States